LIBRARY
SUPREME COURT, U. S.

FILED
FEB 17 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California.

Jurisdictional Statement of Appellant Southern Pacific Company

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON
65 Market Street
San Francisco, Calif. 94105

Counsel for Appellant Southern Pacific Company

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	4
The Questions Are Substantial	5
Conclusion	8
Certificate of Service	9

TABLE OF CITATIONS

Cases	Pages
Bloom v. Illinois, 391 U.S. 194 (1968)	2, 6, 7
Bluefield Co. v. Pub. Serv. Comm., 262 U.S. 679 (1923)	2
Duncan v. Louisiana, 391 U.S. 145 (1968)	6, 7
Hibben v. Smith, 191 U.S. 310, 335 (1903)	6
Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894)	6, 7
Miller v. Schoene, 276 U.S. 272 (1928)	2
Constitution & Statutes	
California Code of Civil Procedure, § 1218	3, 4, 7
California Constitution	
Art. 12 § 22	2, 4, 5, 7
California Public Utilities Code	
Sections 1756-1770	5
Section 2113	2, 4, 5
28 U.S.C. § 1257 (2)	2
Other	
Advance California Reports, 69 A.C. No. 9, p. 1 of Minutes	2

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California.

Jurisdictional Statement of Appellant Southern Pacific Company

OPINIONS BELOW

The unreported opinion and order of the Public Utilities Commission of the State of California (herein sometimes referred to as the "Commission") in Decision No. 74006 are dated April 16, 1968, and copies thereof are attached hereto as Appendix A. The final order of the Supreme Court of the State of California, in No. 22610 (attached hereto as Appendix B), reviewing such Commission order

is reported in the Advance California Reports, 69 A.C. No. 9, p. 1 of the Minutes.*

JURISDICTION

The order of the California Supreme Court, sought to be reviewed, was issued September 25, 1968. On December 20, 1968 appellant filed in the California Supreme Court a timely notice of appeal to the United States Supreme Court. Jurisdiction of this appeal is conferred on the United States Supreme Court by 28 U.S.C. § 1257 (2). Cases believed to sustain such jurisdiction include: *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679 (1923); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Bloom v. Illinois*, 391 U.S. 194 (1968).

STATUTES INVOLVED

1. Art. 12, § 22 of the California Constitution, attached as Appendix C, provides in pertinent part:

> "... the commission and each of the commissioners shall have the power to ... punish for contempt in the same manner and to the same extent as courts of record; ..."

2. § 2113, California Public Utilities Code provides:

> "Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same ex-

*Prior to February 11, 1969, all involved counsel for appellant were under the impression that the Rules of the Supreme Court required filing of this Jurisdictional Statement by February 18, 1969. For the first time counsel became aware on that date that by Rule 13, as revised, effective October 2, 1967, complete docketing of this appeal, including the filing of this statement, was required by December 24, 1968. Accordingly, counsel pray that their inadvertence and ignorance of the revision of Rule 13 be excused and that the docketing of this appeal be permitted by the Court.

tent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto."

3. § 1218 California Code of Civil Procedure states:

"Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both; provided, however, that in justice courts the judge may punish by fine or imprisonment or both, such fine not to exceed, in any case, one hundred dollars ($100), and such imprisonment one day; the conviction, specifying particularly the offense, and the judgment thereon, must be entered in the docket."

QUESTIONS PRESENTED

The questions presented in the notice of appeal are as follows:

1. Can a state statute, consistent with the due process requirements of the Fourteenth Amendment to the Federal Constitution, authorize a state administrative agency to exercise judicial power to adjudge a party guilty of criminal contempt, and impose substantial criminal penalties pursuant to such conviction?

2. Can a state statute, consistent with the due process requirements of the Fourteenth Amendment to the Constitution of the United States, authorize a state administrative agency to exercise judicial power to convict a party of criminal contempt and impose substantial and serious criminal penalties, without affording the alleged contemner an opportunity for a trial by jury?

STATEMENT OF THE CASE

Appellant, a common carrier by railroad operating commuter passenger service between San Jose and San Francisco, California, sought to impose a parking fee on automobiles using public parking lots owned by it adjacent to its stations between those points. The Commission without a hearing issued a temporary restraining order on October 10, 1967, directing appellant to discontinue the parking charges pending investigation by the Commission. Appellant, believing the Commission was completely without jurisdiction to issue this order, sought a writ of prohibition from the California Supreme Court to enjoin it, but also refused to comply with the order. Pursuant to California constitutional and statutory provisions (Art. 12, § 22, California Constitution; § 2113, California Public Utilities Code), which permit the Commission to punish for contempt in the same manner and to the same extent as a court of record, and do not require a jury trial, the Commission then proceeded to hold a hearing without a jury before one of its members and one of its examiners to determine whether appellant was guilty of contempt.

On April 16, 1968 the Commission issued its involved decision and order (Appendix A) convicting appellant of 44 counts of contempt and concurrently imposing a fine of $22,000. Apparently the Commission levied the fine under § 1218, California Code of Civil Procedure, which permits a court to assess a fine of not in excess of $500 for the contempt. However, in assessing the fine the Commission treated the collection of the parking fee from an individual patron as a separate contempt, and determined the total fine by imposing a $500 fine upon each of 44 such instances selected by the Commission during the period when appel-

lant was awaiting a ruling from the California Supreme Court on its petition for a writ of prohibition.

Thereafter, pursuant to §§ 1756-1770, California Public Utilities Code, which sections provide the only method of reviewing a contempt conviction of the Commission, appellant filed a petition for a writ of review in the Supreme Court of the State of California. In that petition, appellant contended, *inter alia,* that Art. 12 § 22 of the California Constitution and § 2113, California Public Utilities Code, as construed to permit conviction of appellant of contempt by the Commission, contravened the Fourteenth Amendment of the United States Constitution in two respects by: (1) delegating contempt powers to an administrative agency; and (2) providing for a contempt conviction by such agency without affording appellant a trial by jury.

On September 25, 1968, the California Supreme Court issued its order, herein sought to be reviewed, summarily denying appellant's petition for a writ of review without an opinion, thus upholding the constitutionality of the questioned California constitutional and statutory provisions.

●

THE QUESTIONS ARE SUBSTANTIAL

Both questions raise substantial federal constitutional issues. The first question presented, whether the power to punish for criminal contempt may be conferred on a state administrative agency, is novel. However, we submit that under the spirit of decisions of this Court, including two handed down only last year, the California Supreme Court clearly erred in its holding with respect to such question. Furthermore, we submit that under the actual holdings of these latter two decisions, the California Supreme Court was also wrong in its conclusion on the second question, that a jury trial was not required in connection with con-

viction of a criminal contempt of an administrative agency involving a serious penalty.

Seventy-five years ago in *Interstate Commerce Commission v. Brimson,* 154 U.S. 447 (1894), this Court recognized that the due process requirements of the Fifth Amendment are violated when a federal administrative agency is delegated power to punish for contempt. The court stated (154 U.S. at 485):

> "Such a body [a federal administrative agency] could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

This Court has also long recognized that, in general, the Fourteenth Amendment carries the same limitations on arbitrary state legislation which the Fifth Amendment imposes with respect to federal action. Thus, in *Hibben v. Smith,* 191 U.S. 310, 325 (1903), the Court declared:

> "The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress; . . . ."

Furthermore, in recent years this Court has extended more and more of the specific protections under the Federal Bill of Rights to state action by virtue of the Fourteenth Amendment. This process culminated in the decisions last term in *Bloom v. Illinois,* 391 U.S. 194 (1968) and *Duncan v. Louisiana,* 391 U.S. 145 (1968). These cases recognize that at the state level due process under the Fourteenth Amendment requires a jury trial in contempt cases, and other serious crimes, but does not require trial by jury

where the alleged offense may be classified as a "petty crime."

As to the first question, in view of the facts that, under the *Bloom* case, state contempt proceedings are to be measured by due process standards and that due process under the *Brimson* case precludes the delegation of contempt powers to a federal administrative agency, a state should be *a fortiori* prohibited from delegating contempt powers to one of its administrative bodies. This conclusion follows even more strongly in view of the fact that state administrative agencies are customarily more political in nature and less quasi-judicial in their approach than federal administrative tribunals, being more often made up of shorter term, non-lawyer, elective, rather than appointive, officials, who generally receive lower salaries.[1]

As to the second question, the *Bloom* and *Duncan* decisions, which definitely require a jury in full fledged contempt and criminal proceedings before a state court, should even more clearly demand a jury trial in criminal contempt proceedings before a state administrative body. This is, of course, assuming that the administrative body imposed a sufficiently substantial criminal penalty to bring the matter out of the petty offense exception recognized in those cases. Here, we submit the fine imposed, $22,000, was sufficiently substantial. Although the $500 fine permitted by § 1218, California Code of Civil Procedure, for a contempt is perhaps not substantial on its face, the California Supreme Court approved the arbitrary construction placed by the Commission on that section as permitting it to consider

1. While, as indicated, in Art. 12, § 22 of the California Constitution (Appendix C), the California Public Utilities Commission is appointive, the term is only for six years. During the period of this case only one of the five members of that Commission was a lawyer, the Commissioner who presided at the contempt hearing.

that it was not faced with what was in reality at most but a single act of contempt, refusal to obey the Commission's order, but rather with 44 separate acts of contempt, selected chargings of the involved parking fee to various motorists. In this fashion, by multiplying $500 by 44, the Commission, as previously indicated, arrived at the very substantial $22,000 fine. On the same theory, since the same parking fee was assessed by appellant against hundreds of other motorists during this period, the Commission could have with impunity just as well have assessed a tremendous fine and imprisoned officers of appellant for five days for each individual car that a parking fee was collected.

CONCLUSION

For the foregoing reasons the Court should note jurisdiction of this appeal and set the substantial federal constitutional issues raised for formal argument.

Respectfully submitted,

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON

By ROBERT L. PIERCE

Counsel for Appellant Southern Pacific Company

CERTIFICATE OF SERVICE

I, ROBERT L. PIERCE, one of the attorneys for SOUTHERN PACIFIC COMPANY, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 14th day of February, 1969, I served a copy of the foregoing Jurisdictional Statement to the Supreme Court of the United States as follows:

On all counsel of record for the CALIFORNIA PUBLIC UTILITIES COMMISSION, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to said counsel at their post office address, 5072 State Building, San Francisco, California 94102.

Dated at San Francisco, California, this 14th day of February, 1969.

ROBERT L. PIERCE

Attorney for
Southern Pacific Company

65 Market Street
San Francisco, Calif. 94105

(Appendices Follow)

Appendix A

Decision No. 74006

Before the Public Utilities Commission of the State of California

City of San Carlos, a Municipal corporation, *Complainant,* vs. Southern Pacific Company, a corporation, *Defendant.*	Case No. 8697 (Filed October 10, 1967)
Investigation on the Commission's own motion into the Rates, Charges, Rules, Operations, Practices, Contracts, Leases, Service and Facilities of all the vehicular parking areas adjacent to railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company.	Case No. 8700 (Filed October 10, 1967)

CONTEMPT PROCEEDING

Alan C. Furth and *John MacDonald Smith,* for Southern Pacific Company, respondent.

Richard D. Gravelle, Counsel for the Commission staff.

OPINION

On November 15, 1967, the Commission issued an order requiring Southern Pacific Company to appear and show cause, if any it had, why it should not be adjudged to be in contempt of the Commission for failing to comply with

certain provisions of a Commission order dated October 10, 1967, as amended by Decision No. 73251 dated October 24, 1967.

Public hearing on the Order to Show Cause was held on November 30, 1967 and December 21, 1967, at San Francisco, with the matter being submitted on the latter date.

The record indicates that by its order dated October 10, 1967, the Commission instituted an investigation into the operations of all vehicular parking areas adjacent to the railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company to determine the reasonableness of parking charges recently imposed or about to be imposed by Southern Pacific Company. Pending such investigation the order restrained Southern Pacific Company from charging or collecting parking tolls at any of its parking areas, adjacent to its tracks, between San Francisco and San Jose. By Decision No. 73251, dated October 24, 1967, following oral argument, the restraining order was modified by excluding therefrom the parking areas located at San Francisco and Mountain View; however, Southern Pacific Company was ordered to charge no more than 25 cents at the Mountain View lot. Decision No. 73251 also required respondent to remove or cover all rental signs and rental equipment from the parking areas made subject to the restraining order as amended.

The order of October 10, 1967, was served upon respondent by registered mail on October 12, 1967, and became effective on November 1, 1967. A copy of Decision No. 73251 was served upon respondent by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

An affidavit in support of the Order to Show Cause was prepared by an employee of the Commission and was introduced as a part of Exhibit C-1. It was his testimony that he visited the parking areas herein considered on November 2, 3, 6, 7 and 8, 1967, and personally observed 44 separate and distinct violations of the Commission's restraining order, as amended. The witness testified that he personally purchased parking lot tickets and observed others purchasing tickets at the various lots. He further testified that respondent had failed to cover the rental signs and rental equipment at said parking areas. The witness also testified that he observed individuals paying 35 cents for parking lot tickets at the Mountain View area.

Respondent made no affirmative showing, but its President appeared pursuant to a subpoena and testified that upon being advised by counsel that the Commission's restraining order was invalid he personally made the decision on behalf of respondent not to comply with said order and that respondent continued its program of collecting parking fees notwithstanding the Commission's order to the contrary.

The record further indicates that the State Supreme Court of the State of California took the following course of action with respect to petitions and an application filed by respondent as a result of the Commission's restraining order:

(1) November 8, 1967, denied respondent's petition for a writ of prohibition.

(2) November 29, 1967, denied respondent's petition for a writ of prohibition and application for a stay of the Commission's restraining order.

(3) December 20, 1967, denied respondent's petition for a writ of review of the Commission's restraining order.

Findings

The Commission finds as follows:

1. Southern Pacific Company is a public utility "railroad corporation" within the meaning of Section 230 of the Public Utilities Code and subject to the jurisdiction of this Commission.

2. On October 10, 1967, this Commission issued an order restraining Southern Pacific Company from charging or collecting parking tolls at any of its parking areas adjacent to its tracks between San Francisco and San Jose pending further order of the Commission. A copy of said order was served upon Southern Pacific Company by registered mail on October 12, 1967, and became effective on November 1, 1967.

3. By Decision No. 73251, dated October 24, 1967, the Commission amended its order of October 10, 1967 and deleted therefrom the parking areas located at San Francisco and Mountain View, and in addition limited the parking charge at Mountain View to 25 cents. Said decision also required Southern Pacific Company to remove or cover all rental signs and rental equipment. A copy of Decision No. 73251 was served upon Southern Pacific Company by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

4. On November 2, 3, 6, 7 and 8, 1967, an employee of the Commission visited the parking areas covered by the Commission's restraining order and personally observed 44 separate instances wherein Southern Pacific Company had failed to comply with the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251.

5. On November 15, 1967, the Commission by Decision No. 73352 issued an order requiring Southern Pacific Company to appear before Commissioner Bennett or Examiner

Daly on November 30, 1967, at the Commission's Courtroom in San Francisco and then and there show cause, if any it had, why it should not be adjudged to be in contempt of this Commission and punished therefor in the manner prescribed by law for the 44 separate and distinct offenses of alleged contempt set forth in the affidavit attached to the Order to Show Cause. A copy of said Order to Show Cause and copies of documents in support thereof were personally served upon an officer of Southern Pacific Company on November 15, 1967.

6. During the course of hearing upon the Order to Show Cause the President of Southern Pacific Company admitted that he was fully aware of the restraining order of the Commission, understood the content and nature thereof, but personally decided on behalf of Southern Pacific Company, not to comply with said order and that said company did in fact collect and continue to collect, as of December 21, 1967, parking charges at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended.

7. Southern Pacific Company at all the times mentioned herein did not, and now does not, specify rates and charges in its schedules filed with the Commission and in effect at such times applicable to the parking charges collected by it at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended; nor was Southern Pacific Company during any of such times authorized by the Commission to assess and collect such charges.

8. The restraining order of October 10, 1967, as amended, has been in effect at all times since November 1, 1967.

9. The Supreme Court of the State of California on three separate occasions since November 8, 1967 has denied to Southern Pacific Company writs of prohibition and re-

view and an application for a stay of the Commission's order of October 10, 1967, as amended.

10. Southern Pacific Company willfully, intentionally and flagrantly failed to comply with the Commission's restraining order of October 10, 1967, as amended, on the 44 separate and distinct instances as set forth in the affidavit in support of the Order to Show Cause in Exhibit C-1 of this proceeding.

Conclusions

1. Southern Pacific Company in willfully and intentionally failing to comply with the Commission's restraining order of October 10, 1967, as amended, on the 44 separate and distinct instances referred to in Finding 10 above is in contempt of the Commission.

2. Southern Pacific Company should be fined the sum of $500 for each of such 44 instances, in the total amount of $22,000, in the manner set forth in the following order.

3. Southern Pacific Company should be directed to formulate and file a plan with the Commission to refund all moneys collected by it as parking charges at the parking areas here involved from November 2, 1967 to the effective date of this order.

A recommended decision was presented to the Commission by Commissioner Bennett. Some revisions were made therein by the Commission, including an additional finding, conclusion and ordering paragraphs. In order that such recommended decision may be available to the parties, a copy thereof is attached hereto (Attachment "A").

ORDER

It is ordered that:

1. Southern Pacific Company is hereby adjudged to be in contempt of the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251 for

failing to comply therewith on the 44 separate and distinct occasions as set forth in the affidavit in support of the Order to Show Cause as evidenced by Exhibit C-1 in this proceeding.

2. Southern Pacific Company, within ten days of the effective date hereof, shall formulate and file with the Commission a plan whereby it will refund parking charges to those persons from whom Southern Pacific Company, without authority from the Commission, collected them in connection with the parking areas named in the order of October 10, 1967, as amended. Such plan shall provide, among other things, that claimants for refunds shall have a period of ninety days, from May 7, 1968, the date upon which Southern Pacific Company shall cause to be published and posted a "Notice of Refund" in an appropriate place, to establish and file their claims.

3. Southern Pacific Company shall pay to the Commission a fine in the amount of $22,000. Such sums as Southern Pacific Company shall pay out, pursuant to a plan referred to in paragraph 2 hereof and which plan will have been approved by the Commission, shall be credited against said fine. The entire amount of the fine remaining unpaid shall in any event be paid within ten days after the expiration of the ninety day period hereinabove mentioned.

The Secretary of the Commission shall cause a copy of this order to be personally served upon Southern Pacific Company and the effective date of this order shall be twenty days after such service.

Dated at San Francisco, California, this 16th day of April, 1968.

PETER E. MITCHELL
President
WILLIAM SYMONS, JR.
FRED P. MORRISSEY
Commissioners

Attachment "A"

Decision No. .....

Before the Public Utilities Commission of the State of California

City of San Carlos, a Municipal corporation, *Complainant,* vs. Southern Pacific Company, a corporation, *Defendant.*	Case No. 8697 (Filed October 10, 1967)
Investigation on the Commission's own motion into the Rates, Charges, Rules, Operations, Practices, Contracts, Leases, Service and Facilities of all the vehicular parking areas adjacent to railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company.	Case No. 8700 (Filed October 10, 1967)

CONTEMPT PROCEEDING

Alan C. Furth and *John MacDonald Smith*, for Southern Pacific Company, respondent.

Richard D. Gravelle, Counsel for the Commission staff.

OPINION

On November 15, 1967, the Commission issued an order requiring Southern Pacific Company to appear and show cause, if any it had, why it should not be adjudged to be in contempt of the Commission for failing to comply with certain provisions of a Commission order dated October

10, 1967, as amended by Decision No. 73251 dated October 24, 1967.

Public hearing on the Order to Show Cause was held before Commissioner Bennett and Examiner Daly on November 30, 1967 and December 21, 1967, at San Francisco, with the matter being submitted on the latter date.

The record indicates that by its order dated October 10, 1967, the Commission instituted an investigation into the operations of all vehicular parking areas adjacent to the railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company to determine the reasonableness of parking charges recently imposed or about to be imposed by Southern Pacific Company. Pending such investigation the order restrained Southern Pacific Company from charging or collecting parking tolls at any of its parking areas, adjacent to its tracks, between San Francisco and San Jose. By Decision No. 73251, dated October 24, 1967, following oral argument, the restraining order was modified by excluding therefrom the parking areas located at San Francisco and Mountain View; however, Southern Pacific Company was ordered to charge no more than 25 cents at the Mountain View lot. Decision No. 73251 also required respondent to remove or cover all rental signs and rental equipment from the parking areas made subject to the restraining order as amended.

The order of October 10, 1967, was served upon respondent by registered mail on October 12, 1967, and became effective on November 1, 1967. A copy of Decision No. 73251 was served upon respondent by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

An affidavit in support of the Order to Show Cause was prepared by an employee of the Commission and was intro-

duced as a part of Exhibit C-1. It was his testimony that he visited the parking areas herein considered on November 2, 3, 6, 7 and 8, 1967, and personally observed 44 separate and distinct violations of the Commission's restraining order, as amended. The witness testified that he personally purchased parking lot tickets and observed others purchasing tickets at the various lots. He further testified that respondent had failed to cover the rental signs and rental equipment at said parking areas. The witness also testified that he observed individuals paying 35 cents for parking lot tickets at the Mountain View area.

Respondent made no affirmative showing, but its President appeared pursuant to a subpoena and testified that upon being advised by counsel that the Commission's restraining order was invalid he personally made the decision on behalf of respondent not to comply with said order and that respondent continued its program of collecting parking fees notwithstanding the Commission's order to the contrary.

The record further indicates that the State Supreme Court of the State of California took the following course of action with respect to petitions and an application filed by respondent as a result of the Commission's restraining order:

(1) November 8, 1967, denied respondent's petition for a writ of prohibition.

(2) November 29, 1967, denied respondent's petition for a writ of prohibition and application for a stay of the Commission's restraining order.

(3) December 20, 1967, denied respondent's petition for a writ of review of the Commission's restraining order.

Findings

After consideration the Commission finds as follows:

1. Southern Pacific Company is a public utility "railroad corporation" within the meaning of Section 230 of the Public Utilities Code and subject to the jurisdiction of this Commission.

2. On October 10, 1967, this Commission issued an order restraining Southern Pacific Company from charging or collecting parking tolls at any of its parking areas adjacent to its tracks between San Francisco and San Jose pending further order of the Commission. A copy of said order was served upon Southern Pacific Company by registered mail on October 12, 1967, and became effective on November 1, 1967.

3. By Decision No. 73251, dated October 24, 1967, the Commission amended its order of October 10, 1967 and deleted therefrom the parking areas located at San Francisco and Mountain View, and in addition limited the parking charge at Mountain View to 25 cents. Said decision also required Southern Pacific Company to remove or cover all rental signs and rental equipment. A copy of Decision No. 73251 was served upon Southern Pacific Company by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

4. On November 2, 3, 6, 7 and 8, 1967, an employee of the Commission visited the parking areas covered by the Commission's restraining order and personally observed 44 separate instances wherein Southern Pacific Company had failed to comply with the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251.

5. On November 15, 1967, the Commission by Decision No. 73352 issued an order requiring Southern Pacific Com-

pany to appear before Commissioner Bennett or Examiner Daly on November 30, 1967, at the Commission's Courtroom in San Francisco and then and there show cause, if any it had, why it should not be adjudged to be in contempt of this Commission and punished therefor in the manner prescribed by law for the 44 separate and distinct offenses of alleged contempt set forth in the affidavit attached to the Order to Show Cause. A copy of said Order to Show Cause and copies of documents in support thereof were personally served upon an officer of Southern Pacific Company on November 15, 1967.

6. During the course of hearing upon the Order to Show Cause the President of Southern Pacific Company admitted that he was fully aware of the restraining order of the Commission, understood the content and nature thereof, but personally decided on behalf of Southern Pacific Company, not to comply with said order and that said company did in fact collect and continue to collect, as of December 21, 1967, parking charges at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended.

7. The restraining order of October 10, 1967, as amended, has been in effect at all times since November 1, 1967.

8. The Supreme Court of the State of California on three separate occasions since November 8, 1967 has denied to Southern Pacific Company writs of prohibition and review and an application for a stay of the Commission's order of October 10, 1967, as amended.

Conclusion

Southern Pacific Company willfully, intentionally and flagrantly failed to comply with the Commission's restrain-

ing order of October 10, 1967, as amended, on the 44 separate and distinct instances as set forth in the affidavit in support of the Order to Show Cause in Exhibit C-1 of this proceeding.

During the course of hearing Southern Pacific Company filed a petition to disqualify Commissioner Bennett. The Commission denied the petition, but the denial will be affirmed in the ensuing order.

ORDER

It is ordered that:

1. Southern Pacific Company is hereby adjudged to be in contempt of the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251 for failing to comply therewith on the 44 separate and distinct occasions as set forth in the affidavit in support of the Order to Show Cause as evidenced by Exhibit C-1 in this proceeding and within ten days after the effective date of this order shall pay to this Commission a fine in the amount of twenty-two thousand dollars ($22,000).

2. The petition of Southern Pacific Company to disqualify Commissioner William M. Bennett is hereby denied.

The Secretary of the Commission shall cause a copy of this order to be personally served upon Southern Pacific Company and the effective date of this order shall be twenty days after such service.

Dated at ....., California, this ..... day of ....., 1968.

Commissioner Gatov Dissenting:

It is my opinon that Southern Pacific Company wilfully and intentionally failed to comply with the Commission's Restraining Order of October 10, 1967 (as amended) on

forty-four separate and distinct instances, and is in contempt of the Commission.

Further, it is my opinion that Southern Pacific Company should be fined in the sum of $500.00 for each of the forty-four instances, or a total amount of $22,000.00.

I do not concur in the order of the majority of the Commission in this case.

/s/ A. W. Gatov
Commissioner

Dated: San Francisco, California,
April 16, 1968

William M. Bennett, Commissioner, Dissenting Opinion

This case had its genesis in proceedings before this Commission concerned with establishing a reasonable fee applicable to Peninsula parking lots owned and operated by the Southern Pacific Company. On November 6, 1967, counsel for Southern Pacific in public hearing before this Commission in Case 8697 was candid in stating on the record that the Southern Pacific Company would not comply with a restraining order previously issued by this Commission on October 10, 1967, and signed by Commissioners Mitchell, Gatov and Symons. Southern Pacific took the position at that time and even during the proceedings herein that the restraining order of the Commission was invalid. Even repeated refusals by the Supreme Court of the State of California to nullify such order was disregarded by the Southern Pacific.

The refusal of the Southern Pacific Company was so notorious that undoubtedly this explains the failure of that company to present any testimony whatsoever by way of a defense to the proceedings initiated or by way of mitigation for its contemptuous action. Southern Pacific conducted

itself with an air of certainty almost as though it had suddenly become immune to the jurisdiction and process of this Commission.

But for the candor of Southern Pacific counsel in freely admitting to violation of the Commission's orders, this matter would not have come to the Commission. It is most curious, perplexing and beyond explanation that neither the staff of this Commission, the Director of Transportation nor the Chief Counsel brought to our attention the disregard by Southern Pacific of a Commission order. Only the frankness of Southern Pacific counsel in the public proceedings apprised us that a lawful order of the Commission was being disobeyed. This is hardly in keeping with the concept of a vigorous, independent staff acting in the public interest. And it is so unlike staff action of recent years when it did exhibit initiative, independence and simply performed statutory duty. We can well ask why staff personnel knowing of Southern Pacific's disregard for a Commission order chose to remain silent. I think it correct to state that but for the information supplied by Southern Pacific counsel as to the railroad's disregard for a lawful order that there never would have been knowledge of contempt let alone proceedings to impose punishment for contempt.

That the Southern Pacific Company considers itself beyond the reach of this Commission and the Supreme Court of this state is plain. It makes its own determination as to that which is binding upon it and obeys or disobeys accordingly.

The interests of its commuters, the authority of this Commission, the public service obligations of this corporation, all are seemingly of little or no concern to the management of Southern Pacific Company. This corporation should realize as should all other California public utilities

that if regulation is to be ignored, if a permissive regulatory climate is to inhibit the vigor of this Commission, then the public will not be served or protected by this Commission, and the raison d'etre for its being will be gone. And when the public realization becomes widespread and if the historical process repeats itself then the only answer toward control of a public service corporation as here lies in public ownership. And shortsighted management enraptured with profit and indifferent to public need can only hasten that day.

The convenient story of the President of Southern Pacific that he believed counsel's advice that the restraining order was not valid discloses a woeful inadequacy upon the part of Southern Pacific counsel and Southern Pacific management. Obviously this was the testimony that had to be given. Merely giving it does not make it credible. Southern Pacific was here testing the Commission and almost got away with it. The difficulty was however that the contempt was so open and flagrant that it could not be disregarded. The distressing thing here is the spectacle of management totally callous toward public responsibilities and indifferent to the obligations of law.

Some comments are in order. The order of my brethren ruling upon my qualifications is irrelevant, unnecessary and beyond their power. As a Commissioner I take my authority from the constitution—not from my colleagues. Further, I had thought that the California Supreme Court had clearly determined this matter when they denied the efforts of the Southern Pacific Company to disqualify me from the case.

Concerning the parking lot decision the majority embarks upon a most curious discussion concerning the tax liability of California railroads. The record is quite clear that

Southern Pacific has a tax expense associated with each parking lot which is the subject of today's order. Heretofore the Commission has always recognized that a public utility whether it be a railroad corporation or other is entitled in the rate fixing process to compensation for taxes paid. And further in the parking lot decision in this Commission dated June 20, 1967, Decision No. 72615 the majority which is now reversing itself found specifically that SP is entitled to recoup *taxes,* assessments, improvements and maintenance of parking lots. Not only is the Commission disregarding its recently enunciated parking lot order but it is disregarding all of the regulatory concepts which heretofore have been considered well established, as part of the rate fixing process of this Commission. We are prompted to wonder why. Today's order insofar as it relates to the parking lots merely sets aside the decision of an impartial examiner who heard the fresh testimony and who judged the credibility of witnesses and the majority arbitrarily rewrites the decision. In seeking to reach some unformulated goal or objective the majority of necessity does violence to basic regulatory principles and law. Does the majority actually hold by this decision that there is question as to whether taxes are an operating expense in a rate proceeding? So far as the staff position is concerned there is no evidence whatsoever from the staff rebutting in any wise the hard fact that Southern Pacific has a tax liability upon each parking lot.

Turning to the contempt proceeding the Commission has mixed two cases terribly. There is nothing whatsoever even by employment of the single word "refund"—about refunds in the contempt case. The opinion in the contempt case which is judicial in nature is supposed to be based upon the order to show cause, the allegations of contempt associ-

ated therewith and only the evidence pertaining to these matters adduced at public hearing. There is nothing in the contempt proceedings about refunds and therefore it is improper for the Commission to be mixing parking charges, refunds, and a punitive fine in one composite order. The staff has advised us that the contempt order is erroneous in presenting for the first time and in the ultimate majority decision discussion of refunds.

There is, however, a sly benefit to the Southern Pacific by the intrusion of the irrelevancy of refunds. Southern Pacific well knows that refunds are not part of a contempt order. And all today's majority order does is to defer and to place in doubt a specific fine of $22,000. Southern Pacific is required to set up some type of plan detailing the manner in which it shall refund parking charges. And the logical question arises at this point whether or not Southern Pacific is to base a refund plan upon Examiner Daly's original decision which provides for a 35 cent daily parking charge or whether the refund plan is to be based upon the majority's tentative daily charge of 25 cents. Standing plain in all of this is the fact that the 25 cent daily charge of the majority is not final in that the majority parking lot decision sets the matter down for further testimony to decide the tax issue and upon resolution of that issue conceivably the parking lot charge will, unless we abandon all past regulatory precedent, revert to the 35 cent charge which includes taxes as proposed by the examiner herein originally.

There is nothing in the majority order which covers the period of refunds by way of termination and all today's majority orders do is to defer any real decision either on parking lot charges or by way of imposing a $22,000 fine now for perhaps the most flagrant contempt ever visited

upon this body. Further, the confusion contained in today's contempt order whether deliberate and calculated by way of deliberate error to constitute reversal error on an appeal or whether coming from lack of expertise in the regulatory field has the same end result. And that end result is that nothing is being done to Southern Pacific. The Commission has given the Southern Pacific a beautiful error as the basis for rehearing—indeed the majority being placed upon notice of the deliberate error were quick to point out that Southern Pacific could ask for a rehearing.

One wonders whether or not the contempt order as it has been doctored and diluted by the extraneous element of refunds and as it has been rewritten has in fact given the Southern Pacific due process. My brethren do not seem to realize that contempt is a judicial proceeding and because of the penalties involved rights are to be scrupulously observed. The handling of today's orders is unique. Apparently now parties before us are to be treated to the copycat decision. And the Commission at least to its credit advertises the pure results of an impartial examiner and then illustrates its absolute power by arbitrarily assigning a decision to an examiner who never heard a line of testimony and to a commissioner who did not set on even one day's hearing. Southern Pacific is to be congratulated. A friendly Commission can achieve its ends either by an outright bold favor or if they be too much for public consumption then it can write a decision and place in it very carefully and deliberately a finding and a procedure here concerning refunds which constitutes in my opinion the basis of a successful appeal. Better then a friend of the court utilities now are served by friends at the court.

The decisions proposed by Examiner Daly were the ones which should be signed. In short, Southern Pacific should be

ordered to pay and at once a $22,000 fine. Their contempt was notorious, flagrant, self-serving and illustrative of a consistent public be damned attitude. As to the parking lot charges if the Commission does not know that since 1912 we have allowed taxes as an operating expense, they are free to wend their way through that concept and to arrive inevitably at the result contained in the examiner's original report. Southern Pacific today by the gentle treatment accorded them now has a license to be indifferent, arrogant and, if necessary, contemptuous.

/s/ WILLIAM M. BENNETT
Commissioner

Dated: San Francisco, California
April 16, 1968

Appendix B

ORDER DENYING WRIT OF REVIEW

S.F. No. 22610

In the Supreme Court of the State of California

In Bank

Southern Pacific Company

v.

Public Utilities Commission

Petition for writ of review DENIED.

Filed Sep 25 1968 William I. Sullivan, Clerk

By JSR

S.F. Deputy

TRAYNOR

Chief Justice

Appendix C

California Constitution

Art. 12 § 22. Public utilities commission; commissioners; rates; regulation of utilities; delegation of legislative power

Sec. 22. The Railroad Commission is continued in existence as the Public Utilities Commission, which shall consist of five members. The commission shall be appointed by the Governor from the State at large; provided, that the Legislature, in its discretion, may divide the State into districts for the purpose of such appointments, said districts to be as nearly equal in population as practicable; and provided further that the three commissioners in office at the time this section takes effect shall serve out the term for which they were elected, and that two additional commissioners shall be appointed by the Governor immediately after the adoption of this section, to hold office during the same term. Upon the expiration of said term, the term of office of each commissioner thereafter shall be six years, except the commissioners first appointed hereunder after such expiration, one of whom shall be appointed to hold office until January 1, 1917, two until January 1, 1919, and two until January 1, 1921. Whenever a vacancy in the office of commissioner shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term. Every appointment made by the Governor to the commission shall be subject to the advice and consent of a majority of the members elected to the Senate, except that if a vacancy occurs when the Legislature is not in session, the Governor may issue an interim commission which shall expire on the last day

of the next regular or special session of the Legislature. Commissioners appointed for regular terms shall, at the beginning of the term for which they are appointed, and those appointed to fill vacancies, shall, immediately upon their appointment, enter upon the duties of their offices. The Legislature shall fix the salaries of the Commissioners, but pending such action the salaries of the commissioners, their officers and employees shall remain as now fixed by law. The Legislature shall have the power, by a two-thirds vote of all members elected to each house, to remove any one or more of said commissioners from office for dereliction of duty or corruption or incompetency. All of said commissioners shall be qualified electors of this State, and no person in the employ of or holding any official relation to any person, firm or corporation, which said person, firm or corporation is subject to regulation by said Public Utilities Commission and no person owning stock or bonds of any such corporation or who is in any manner pecuniarily interested therein, shall be appointed to or hold the office of Public Utilities Commissioner. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every order made by a commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the order of the commission.

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and *the commission and each of the commissioners shall have the power to* administer oaths, take testimony and *punish for contempt in the same manner and to the same extent as courts of record;* the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.

The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the "Railroad Commission Act" of this State

approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five commissioners provided for herein.

Whenever in this Constitution or the laws of this State "Railroad Commission" is used, it shall be deemed to refer to the Public Utilities Commission. (Emphasis supplied).